No. 92-1561

In The

Supreme Court of the United States

October Term, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,

Petitioner,

v.

JOSHUA H. BERGER and MORIAH H. BERGER, b/n/f/ ALLEN H. BERGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Petitioner's statement of the questions presented for review is inaccurate and inappropriate because it is laced with factual characterizations that are slanted, argumentative and not faithful to the record. A fair and objective statement of the issues raised in the courts below is:

1. Does the Establishment Clause of the First Amendment to the United States Constitution prohibit a public school from allowing a sectarian religious organization to proselytize and distribute Bibles to elementary school students in the school building during regular school hours?

2. Did the Petitioner School Corporation intentionally create a designated public forum in the Rensselaer Middle School, thereby endowing the Gideon organization with the right under the Free Speech Clause of the First Amendment to express itself by handing out Bibles to fifth grade schoolchildren?

PARTIES

Respondents accept and adopt the statement of the Parties set out in the Petition for Writ of Certiorari.

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BRIEF OF RESPONDENTS IN OPPOSITION

DECISIONS BELOW

Respondents accept and adopt the statement of the Decisions Below set out in the Petition for Writ of Certiorari.

JURISDICTION

Respondents accept and adopt the statement of the Jurisdiction of this Court set out in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Respondents accept and adopt the statement of the pertinent constitutional provisions, statutes and regulations set out in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This action was brought by a parent for himself and his two minor children, students then enrolled in the first and fifth grades at schools operated by the Rensselaer Central School Corporation ("School Corporation"), seeking a declaratory judgment and preliminary and permanent injunctive relief. The plaintiffs alleged that certain practices of the School Corporation involving the distribution and dissemination of religious material is in violation of their rights under the First and Fourteenth Amendments to the United States Constitution and Sections 3 and 4 of Article I of the Constitution of the State of Indiana.

The case was presented to the district court in the posture of cross motions for summary judgment. Two issues were raised: first, whether there was a justiciable controversy giving the plaintiffs standing to sue; and, second, whether the practice of the School Corporation of distributing Gideon Bibles during school hours and on school premises violated the Establishment Clause of the First Amendment to the United States Constitution.

The district court found in favor of the plaintiffs on the first issue, deciding that the plaintiffs had standing. However, based solely on an analysis under the three-pronged test prescribed by *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755-756 (1971), the court ruled in favor of the School Corporation on the second, substantive issue, declaring that "[p]ermitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime." *Berger v. Rensselaer Central School Corporation*, 766 F.Supp. 696, 706 (N.D.Ind. 1990). The district

court concluded that "[a]lthough the distribution of religious literature in the public schools necessarily presents close and difficult questions of constitutional law, . . . the regime in Rensselaer under which these materials are made available to students does not run afoul of the First Amendment's Establishment Clause." *Id.* at 707.

In the appeal to the Seventh Circuit Court of Appeals, the School Corporation requested that the proceedings be held in abeyance awaiting the opinion of this Court in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), which at the time had been briefed and argued, but not decided. The Seventh Circuit obliged, postponing oral argument for ten months and directing the parties to re-brief the issues in light of the opinion in *Lee*. *See Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160, 1162 (7th Cir. 1993).

The Court of Appeals then reversed. Stating that "we must continue to view with suspicion governmental forays into religious activity, particularly in the context of public schools[,]" and finding that "[t]he relationship between the [School] Corporation and the Gideons cannot survive this scrutiny[,]" the Seventh Circuit held that, "[u]nder the principles enunciated in *Lemon* and *Lee*, the distribution of Bibles in Indiana Schools offends the First Amendment of the Constitution." *Id.*

STATEMENT OF FACTS

I. Respondent's Statement of Facts

Since 1969, the Rensselaer Central School Corporation has had a policy governing the distribution, display and exhibition of materials on school premises. *Petitioner's App. D.*, p. 42a. With one exception,[1] no person or group other than the

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[1] During the 1985-86 school year, a book entitled *Young People of the Bible* was handed out by the teacher to the members of at least one fifth grade class. *Mindy Suhr Aff.*, ¶3, pp. 239-40, *App.* p. 280. This book, which contained artist's renderings and brief stories about Jesus and several Old and New Testament figures,

Gideons ever sought or was permitted under this policy to distribute religious literature in the Rensselaer schools. *Lewis Dep.* p. 37, *App.* 655.

This policy also governed the distribution of informational materials submitted by non-religious groups, such as the 4-H, the Boy Scouts and the Girl Scouts. According to Superintendent Dinsmore, however, the materials submitted by such groups were nothing more than "sign-up" forms by which parents could, should they wish, indicate "their child's interest" in joining the organization. *Dinsmore Dep.*, pp. 22-23, *App.*, pp. 448-49.

Similarly, Gordon C. Lewis, Principal of the Rensselaer Middle School where the fifth grade is located, stated that the School distribution policy was used in his building only in connection with a history essay contest sponsored by the Daughters of the American Revolution, and math and reading contests. *Lewis Dep.*, pp. 8-10, *App.*, pp. 626-28. In each instance, Mr. Lewis said, the material submitted for distribution merely contained information regarding the steps necessary for interested students to participate in the contests. *Id.*, p. 8, *App.* p. 626. The sole function of the School was "to just make it available and sit [sic] it on a counter in the office and let students know it's there." *Id.* None of it was distributed in the classroom. *Dinsmore Dep.*, p. 23, *App.* p. 449.

For at least 35 years[2] – 15 of which antedate the written policy,[3] the School Corporation has engaged in the annual

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was presented "as a gift" to the children from two local businesses and the "In Jesus' Love" Foundation, Inc. of Rensselaer. *Id.* at ¶4, Exh. A, *App.*, pp. 241-274. *See* 982 F.2d at 1165.

[2] The School Corporation acknowledges that representatives of the Gideon organization annually distributed Bibles to fifth grade students "for so many decades that no one can remember when the practice commenced." *App.*, p. 173. A Gideon representative closely associated with distribution of Bibles in the Rensselaer schools stated that "it probably would have been sometime in the Fifties that it was started, and it was carried on every year with very few exceptions, if any, since that time. . . . " *Kooy Dep.*, p. 7, *App.*, p. 727.

[3] Because the practice of allowing the Gideons to distribute Bibles in the schools began long before adoption of the policy, the nexus between the two is not

practice of distributing Bibles to all fifth grade students. *Kooy Dep.*, pp. 41-42, *App.*, pp. 761-62. For the past several years there have been approximately 145 children comprising five separate fifth grade classes.[4] *Lewis Dep.*, p. 40, *App.*, p. 658; *Brooks Dep.*, p. 21, *App.*, p. 569. The Bibles are provided without charge by the Gideons, and are handed out during regular school hours by two Gideon representatives who are permitted to address the students. *Lewis Dep.*, pp. 23-24, *App.*, pp. 641-42; *Brooks Dep.*, pp. 19-20, *App.* p. 567-68.

Distribution usually takes place in the five classrooms, although it has also been done in the school gymnasium and, on occasion, in the hallway near the principal's office after all fifth graders have been assembled for that purpose. *Lewis Dep.*, pp. 43-44, *App.*, pp. 661-62; *Brooks Dep.*, pp. 22-28, *App.*, pp. 570-76. The fifth grade teacher is present during the distribution of Bibles, *Brooks Dep.*, p. 20; *App.*, p. 568, and the principal of the Middle School. "frequently set [sic] in on the presentations." *Ockermann Aff.*, p. 2; *App.*, p. 789. After delivering a short "spiel"[5] and encouraging the children to read the book they were about to receive, the Gideon representatives ordinarily place a box of Bibles on a desk or table

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as self-evident as the School Corporation suggests. On this point, incidentally, Petitioner erroneously states that the Court of Appeals held the School Corporation's "policy and practices" to be violative of the Establishment Clause. *Petition*, p. 10. To the contrary, Respondents raised an "as-applied" challenge to the *practice* of distributing Bibles to fifth graders; as the Court of Appeals correctly noted, "[t]he policy itself does not treat religion directly and, thus, on its face, raises no Establishment Clause concerns." 982 F.2d at 1163, n.3.

[4] Under Indiana law, each child is required to attend either a public school or some other qualified and licensed school which is taught in the English language. I.C. § 20-8.1-3-17.

[5] "Spiel" was the term used by the district court to describe the Gideons classroom presentation. 776 F.Supp. at 700. It is defined as a "pitch" or speech "for the purpose of luring people to a movie, a sale, etc." *Random House Dictionary of the English Language*, Unabridged Ed., 1369-1370 (Random House 1967). Respondents have always contended that it was just that, a proselytization, however brief. Nonetheless, the School Corporation says that "there was no scripture taught by the Gideons and no proselytizing efforts made by Gideon representatives in the classroom." *Petition*, p. 7. But if the classroom was really a public forum, one might ask, why couldn't, and why didn't, they proselytize?

and the children line up and take a Bible as they pass by. *Brooks Dep.*, p. 20, *App.*, p. 568; *Lewis Dep.*, pp. 42-43, *App.*, pp. 660-661; *Kooy Dep.*, pp. 30-31; *App.*, pp. 750-51 ("They came in a line, well ordered – very orderly. Teachers line them all up and they come by one by one.")

Although the School Corporation had a policy of obtaining the parental permission prior to the distribution, permission slips were not used, at least in recent years. *Lewis Dep.*, p. 21, p. 639; *Brooks Dep.*, p. 15, *App.*, p. 563. More often, the Gideon representative simply advised the children that should their parents object, they could return the Bible – but to the fifth grade teacher, not the Gideons. *Kooy Dep.*, p. 26, *App.*, p. 746.

The Gideon Bibles are not used in the school for any pedagogical purpose; they are not studied for literary or historical value. *Brooks Dep.*, p. 26, *App.*, p. 574; *Kooy Dep.*, p. 42, *App.*, p. 762. In fact, they are not used in the classroom at all; rather, the children are requested to take them as personal gifts and to read them daily. *Kooy Dep.*, pp. 31, 32-33, 42, *App.*, pp. 751, 752-53, 762. The inside back cover of at least some of the Gideon Bibles contained a place for the personal signature of each student under a confession of faith entitled, "My Decision to Receive Christ As My Saviour." *Mindy Suhr Aff.*, ¶6, Exh. A, *App.*, pp. 276, 281.

In all the years Bibles have been distributed, no one ever objected. So, in October of 1989 the Gideon Organization once again made arrangements with the School Corporation to distribute Bibles. However, prior to the planned distribution, based on his belief that "this practice is in clear violation of constitutional principles mandating a separation of church and state," Allen H. Berger, in a letter to the School Superintendent requested "official disavowal of these practices by the Rensselaer school board and a conference with [the Superintendent] to confirm policy directions." *Berger Dep.*, Exh. 1, *App.*, p. 375. Dr. Berger, a professor of anthropology at St. Joseph's College in Rensselaer, made the request on his behalf and that of his two children, Joshua and Moriah.

As a result of Dr. Berger's objection, the Gideons did not distribute Bibles as planned. Middle School Principal Lewis

informed the Gideon representative that the previously arranged date for distribution was no longer "convenient" but that "should there be a reschedule or should [he] need to be back in touch with him, [he] would do so." *Lewis Dep.*, p. 54, *App.*, p. 672. Mr. Lewis "didn't especially at that point permanently cancel" the distribution of Bibles, but told the Gideon representative that "we were in, . . . for lack of a better way to put it, kind of in a holding pattern. . . . " *Lewis Dep.*, p. 52-53, *App.*, pp. 670-71. Mr. Lewis was already acquainted with the Gideon representative, for not only had he dealt with him in prior years, but he had been a special guest at a banquet held by the Gideons the year before "more or less as an officer of the School Corporation." *Lewis Dep.*, pp. 35-36, *App.*, pp. 653-54.

Dr. Berger's letter was then taken up by the Board of School Trustees at a public meeting. At that time, the President of the Board read a short prepared statement that concluded with the statement that "our policy concerning distribution, display or exhibition of [religious] materials on school premises remains unchanged." *Dinsmore Dep.*, Exh. C, *App.*, p. 531. Soon thereafter, Superintendent Dinsmore stated at a faculty meeting that, pursuant to the School Corporation's policy, she would approve for distribution religious materials promulgated by any religious organization other than the "satanists." *Dinsmore Dep.*, pp. 73-74, *App.*, pp. 499-500.

According to the frontispiece of a Gideon Bible distributed in the Rensselaer schools,

> The Gideons International is an Association of Christian business and professional men, banded together in more than ninety countries for fellowship and service. The purpose of the Association is the promotion of the Gospel of Christ to all people, to the end that they might come to follow the Lord Jesus Christ as their personal Saviour.

Mindy Suhr Aff., Exh. A., *App.*, p. 280. The Gideons seek to accomplish this purpose by distributing Bibles so that "men and women and boys and girls might come to be followers of Jesus Christ, accept him as their Lord and savior . . . and

become a confessing Christian in some church." *Kooy Deposition*, pp. 41-42, *App.*, pp. 761-62.

II. Petitioner's Misstatements of Fact

1. **The School's Policy Was a Trespass Regulation.** At various places in the Petition, the policy adopted by the School Corporation in 1969 is described as "Rensselaer's community literature distribution and access policy." *Petition*, pp. 7, 8, 9, 16, 20, 24, 25. This spin on the text of the policy is obviously intended to buttress Petitioner's argument that the policy was intended to create a public forum in the Rensselaer Middle School.[6] However, that characterization is belied by the policy's title and operative language ("Distribution, display or exhibit of materials on school premises shall be conducted as follows:"), as well as a cursory review of its provisions. *See Petitioner's App.*, pp. 46a-47a.

Clearly, the policy has nothing specifically to do with "literature," nothing at all to do with "access" and only inferentially – if at all – involves the "community." The policy does not encourage persons or parties to use a forum provided by the School Corporation, and neither its language nor tone is invitatory or permissive. On the contrary, it is prohibitory in tenor, negatively stated and obviously designed to place constraints on the use of non-school materials on school premises. If permission is not obtained to disseminate materials in the manner prescribed, bad things happen: students doing so are subject to discipline and outsiders may be prosecuted as trespassers. *Id.* (Pol. Nos. 5501.4 and 5501.5).

Finally, there is nothing in the policy regarding verbal speech. The policy is totally silent as to discourse, discussion

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[6] For like reasons, Respondents disagree with Petitioner's repeated reference to School Corporation "campuses." *Petition*, pp. 20, 22, 23, 24. There are no "campuses" owned by the School Corporation as that term is commonly understood; rather, it seems the term is used only to enhance the argument that this case is to be governed by public forum cases such as *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), which involved a student religious group on the campus of the University of Missouri, and to generally endow this alleged primary school forum with an aura of intellectual sophistication it does not really enjoy.

or debate, traditional uses to which a public forum is put. Indeed, Superintendent Dinsmore testified that the School Corporation had no policy governing verbal presentations to students. *Dinsmore Dep.*, p. 38; *App.*, p. 464. The School Corporation's remarkable suggestion that this testimony supports its attempt to parlay this policy into some kind of equal access open forum is unavailing, for even if representatives of the Boy Scouts, the 4-H and other similar groups spoke directly to students in the school building (and the evidence is they did not do so), by the language of Policy No. 5501 their speech was beyond its intended scope.

2. **Neither the Policy Nor Its Implementation Were Content Neutral.** In similar fashion, Petitioner disingenuously describes the policy as "content neutral" and "viewpoint neutral." *Petition*, pp. 3, 9, 13, 22. The description does not fit.

To the contrary, the policy itself requires that materials submitted for "approval" be "cleared 72 hours (three (3) school days) in advance of any distribution." *Petitioner's App.*, p. 46a (Pol. No. 5501.2). "[U]nless authorized by the superintendent and the building principal," according to the policy, no student or outsider "shall distribute, display, or exhibit" any written publication. *Id.* (Pol. No. 5501.1). Based on this mandatory language one might well ask how else could school authorities possibly administer the policy and determine the acceptability of the material proffered without reviewing its content?

Thus, Petitioner's statement that "Rensselaer's understanding of its role as a school corporation is that it may not censor speech based on its content," *Petition*, p. 20, is patently absurd. Would school officials in that community stand idly by, should an outsider wish to speak to fifth graders on the legalization of marijuana or the use of condoms? *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (high school student's free speech rights held not violated where school officials suspended him for two days for making sexually suggestive speech at school assembly). Indeed, the Superintendent of Schools stated unabashedly that, if the situation presented

itself, she would censor anything presented for distribution by the "Satanists" because "we are responsible for protecting the moral being of the kids." *Dinsmore Dep.*, pp. 73-74; *App.* pp. 499-500; *see* 982 F.2d at 1160. On another occasion, Principal Lewis vetoed a bulletin board display that an outside firm had requested to erect near the door of the school building. *Dinsmore Dep.*, pp. 25-26; *App.*, pp. 451-52.

The fact of the matter is that the School Corporation does censor speech, it does "direct and control" who says what in the classroom all the time. If it did not, not only would it be guilty of shirking its duty to run the schools in an orderly and effective manner, it would render the approval provisions of the policy at issue completely meaningless.

3. **The Fifth Grade Classrooms Were Not Open to Outsiders.** Petitioner states that under the subject distribution policy, "Rensselaer's classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens. . . . " *Petition*, p. 3. This statement is misleading at best and a misrepresentation at worst.

Petitioner relies solely on a statement of Superintendent Dinsmore that "the 4-H, the Boy Scouts and et cetera have been allowed to speak to students." *Petition*, p. 4, n.1. The Superintendent's account on this score, however, is neither accurate nor credible, for three reasons: first, the Superintendent got her information second hand from the Principal or faculty at the Middle School, as she was not on site, *see Dinsmore Dep.*, pp. 32, 34, 83; *App.* pp. 458, 460, 509; second, her account contradicts that of the Principal and fifth grade teacher who were directly involved, and from whom she got her information in the first place, *Lewis Dep.*, p. 8-10, *App.*, pp. 626-28; *Brooks Dep.*, p. 8, *App.*, p. 556; and, third, she testified elsewhere that "we do give permission to 4-H, Boy Scouts, summer athletics, and et cetera to distribute permission forms . . . ," *Dinsmore Dep.*, p. 23; *App.* p. 449, indicating that any explanation provided by groups seeking to distribute "sign ups" was undoubtedly done through the Principal's office, as Principal Lewis testified. *Lewis Dep.*, pp. 8-10, *App.*, pp. 626-28. There is simply no probative evidence

that outside speakers other than Gideon representatives personally addressed the fifth grade students in the classroom, auditorium or any other place in the schoolhouse at any time in the past.

4. **Parental Permission Slips Were Not Generally Used.** Petitioner states that "[r]eligious literature distributed by the Gideons in the Rensselaer School System was generally distributed only after parents received parental permission slips" and that use of such forms was "a regular policy and practice." *Petition*, p. 5. This is not accurate.

Superintendent Dinsmore admittedly did not know whether parental approval was obtained or not. *Dinsmore Dep.*, pp. 31, 82; *App.* pp. 457, 508. Concerning permission slips, she said: "No one seems to really remember what was done. Its's amazing." *Id.*, p. 32; *App.*, p. 458. Principal Lewis and fifth grade teacher Brooks were the only school personnel of record directly involved in the distribution of Bibles. Mr. Lewis stated: "I haven't been aware that a parental permission slip was necessary or needed for all the years the students were in the middle school," *Lewis Dep.*, p. 21; *App.*, p. 639, and Ms. Brooks testified that parental permission slips were never used in the eight years she taught in the fifth grade. *Brooks Dep.*, pp. 19, 22, 24-25; *App.*, pp. 567, 570, 572-73.

5. **The Gideon's Presentation and the Distribution of Bibles Usually Took Place in the Classroom.** Petitioner states that only once "in the last six years" was religious literature distributed in the classrooms. *Petition*, p. 7. This statement seems deliberately misleading, for there has been no distribution of Bibles at all in the four school years since Dr. Berger objected in the Fall of 1989. As for prior years, Ms. Brooks, the person most likely to know, testified that in the eight years she taught the fifth grade, Bibles were distributed each year and that distribution took place in the classroom in all but two of those years. She could not remember the exact year distribution took place in the gym and in the hallway near the principal's office. *Brooks Dep.*, pp. 16, 22-23; *App.*, pp. 564, 570-71. Contrary to the impression Petitioner seeks to convey, the Superintendent's understanding was that the appearance of Gideons in the classrooms was

a "pretty consistent" practice. *Dinsmore Dep.*, p. 35; *App.*, p. 461.

6. **The Gideon's Presentation and the Distribution of Bibles Took Place As Part of Regular Classroom Activities.** Petitioner states that "distribution of material under the policy, whether religious or not, was all done 'outside the instructional time.' " *Petition*, p. 7. This absurd statement is apparently based on Superintendent Dinsmore's convoluted testimony concerning a 1988 directive from the State Department of Education concerning the prescribed length of the school day and school year. *Dinsmore Dep.*, p. 69-72; *App.*, pp. 495-98. Testifying that the State required 300 minutes per day for instructional time, Ms. Dinsmore said that "we have extra minutes without instructional time that we can utilize for release time." *Id.*, p. 71, *App.* p. 497. As for "release time," she said: "Let me stop and think for a moment. There still may – I do not recall, but it seems to me there still may be something in there on release time for religious training, but I cannot swear to that." *Id.* In any event, Ms. Dinsmore stated that she had no assurances from teachers or principals that the distribution of Bibles was actually made during "release time." *Id.*

More straightforward was the testimony of fifth grade teacher Brooks: "Q. Do you recall whether [the distribution of Bibles] was prior to the opening of school or following the closing of regular school hours? A. Oh, it was during the school day." *Brooks Dep.*, p. 22.

SUMMARY OF THE ARGUMENT

Petitioner's entire public forum argument is nothing more than a diversion, a proverbial "red herring." The very thought of a public forum in a fifth grade classroom is "oxymoron-ic", ludicrous on its face – an exercise in *reductio ad absurdum*, as one court has said. The Court of Appeals was correct in observing that the reason the Gideons seek to distribute Bibles in the school on school time is because there and then they can address a captive audience, not because a fifth grade

classroom is a good place to attract a crowd. More importantly, the Appeals Court's application of public forum law to the School Corporation's claim that it never "censored" speech but created a "community forum" for the debate and discussion of ideas in its elementary school classrooms, is sound and its conclusion on the point is unassailable.

This diversion from the real issues was necessary because the School Corporation's Bible distribution program cannot stand scrutiny under Establishment Clause jurisprudence as expressed in either *Lemon* or *Lee* or, as here, both of these important cases. The Court of Appeals "took its lead" from *Lee*, holding that that very recent decision "leaves little room for public schools to teach or promote religion, and the distribution of Gideon Bibles cannot fit in these restrictive confines." However, it "would have decided this case this the same way had the Supreme Court never heard *Lee* ," also holding that two of three parts of the more traditional *Lemon* test had been violated. In summary, *Lemon* and *Lee*, considered separately or in tandem, place the Rensselaer School Corporation's Bible distribution program outside the parameters of constitutionally acceptable public school involvement in religion.

The decision of the Court of Appeals in this case is well conceived and clearly and forcefully expressed. More importantly, it reaches the correct result, one that is consistent with the decisions of this Court in the important areas of speech and religion.

The Petition for Certiorari should therefore be denied.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioner has asserted that the decision of the Court of Appeals conflicts with Supreme Court decisions involving the First Amendment in two areas: religion (establishment clause) and speech (public fora). Neither argument is persuasive.

A. Establishment of Religion Clause

1. The Seventh Circuit Decision Is Consistent With *Lee v. Weisman*.

Viewing traditional Establishment Clause analysis under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), as not boding well for its Bible distribution policy, during the appeal to the Seventh Circuit the School Corporation suggested a hiatus while this Court worked on *Lee v. Weisman* which, at the time, had been argued but not decided. Perceiving *Lemon* as "highly unfavorable to its position," the School Corporation "anxiously, almost gleefully" awaited *Lee*, expecting "a radical change in Establishment Clause jurisprudence to allow more state involvement with religion." 982 F.2d at 1162.

As we know, this did not happen. Referred to in some quarters as "the revolution that wasn't,"[7] the decision in *Lee* had an effect quite different from that expected by the School Corporation, causing it to put as much distance as possible between its distribution of Bibles and the graduation prayer in *Lee*.

Having beaten this retreat, the School Corporation now states that the Court of Appeals' reliance on *Lee* is "misplaced," *Petition*, p. 14, and that it violated *Lee*'s "essential holding", which is that "the *state* must 'direct and control' religious speech in order to violate the Establishment Clause." *Petition*, p. 19. This argument is based on the fact that, in *Lee*, the school principal decided that an eighth grade graduation ceremony should begin and end with a prayer and invited Rabbi Gutterman to lead them. To aid his preparation, the principal provided the Rabbi with a "Guideline for Civic Occasions," and asked that the prayers be nonsectarian. *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467, 481 (1992). Here, the School Corporation asserts, it did not decide that religious activity should occur, it did not select the

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[7] Tyner, Mitchell A., "Lee v. Weisman: The Revolution That Wasn't." *Liberty Magazine* 12 (September/October 1992).

speaker and it gave no advice regarding the content of the message. *Petition*, p. 20.

The Court of Appeals correctly discerned that, "[i]n essence, this is an argument that the distribution of Gideon Bibles lacked state action." 982 F.2d at 1165. "Under this view," the court continued, "the Corporation was merely a conduit or neutral non-participant through whose doors ideas could pass without changing or being changed by the schools' participation." *Id.* In addition to referencing the analysis of the Court of Appeals, which is right on the mark, *Id.* at 1165-66, the Respondents offer a few additional observations.

First, implicit in this argument is that the School Corporation remains perfectly neutral and does not become engaged in any decisional way in the process leading to the annual distribution of Bibles. But are we to believe that Gideon representatives just wander into fifth grade classrooms whenever they get the urge and hand out whatever they want? Of course not. The School's policy itself requires that the superintendent and the principal approve the material three school days in advance and that, "[i]f permitted, the time and location of distribution . . . is to be determined by the administration." *See* 982 F.2d at 1162, n.1. Bibles have been distributed in the Rensselaer schools for the past 35 years, and school officials have always given their complete approval as Gideon representatives head for the fifth grade classrooms each Fall with large boxes of books under their arms.

Moreover, this argument – and this reading of *Lee* – unduly raises to a level decisive of Establishment Clause issues the factual determination of who it is that *initiates* and *constructs* the religious speech. Because the Gideons, not the School Corporation, request leave to distribute Bibles, so the argument goes, the School is just "a conduit or neutral non-participant." 982 F.2d at 1165. After all, in *Lee*, wasn't it the principal who invited the Rabbi to lead the prayers, and wasn't it the principal who directed that they be non-sectarian?

Aside from the fact that there is nothing in *Lee* nor any other Establishment Clause case supportive of this proposition,[8] it doesn't make any sense. Would the decision in *Lee* have been any different had Rabbi Gutterman contacted the principal and asked to pray the benediction, rather than the other way around? Or would the decision have been different had he shown a draft of his prayer to school officials and obtained their approval prior to the graduation ceremony, similar to the procedure in Rensselaer? Would it have been different if, instead of offering a prayer, the Rabbi had distributed a religious tract to the students as they lined up for their diplomas? It is absolutely inconceivable that the Rensselaer public schools would permit unknown persons or groups to come into the classrooms, auditoriums and hallways of its school buildings and say or do anything in the presence of primary school children without the "direction and control" of its administrative officers. In fact, exercise of "direction and control" is the obvious purpose of the School's distribution policy in the first place.

Finally, in its Petition, the School Corporation provides a recitation the facts of *Lee* that purportedly distinguish it from

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[8] In the religious display cases, for example, it has never been critical that the government, rather than a private person or organization, requests the display of a creche or menorah on public property in order to run afoul of the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 671, 104 S.Ct. 1355, 79 L.Ed.2d 604, 608-609 (1984) (creche exhibited on public property as joint undertaking of retail merchants' association and city of Pawtucket, R.I.); *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 579, 587, 109 S.Ct. 3086, 106 L.Ed.2d 472, 485, 490 (1989) (county permitted Holy Name Society to display creche on its property; menorah owned by Jewish organization, but stored, erected and removed by city of Pittsburgh). Under *Lemon* and its progeny, violation of the Establishment Clause turns mainly on whether the state *endorses* the speech, not on who requests that it be delivered. Endorsement may be evidenced by the state's active participation or its passive acquiescence. Thus, initiation and design of the speech may be factors bearing on the endorsement issue, but they are not outcome determinative as the School Corporation suggests. *See e.g., Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476, 1478-1479 (7th Cir. 1991) (fact that Village selected and recruited priest to pray an "Italian Mass" in Village festival in public park evidence of endorsement, but other evidence could have been introduced at trial to show that private club was true sponsor of the Mass).

those in evidence here. *Petition*, pp. 19-20. The Respondents close this part of the argument by providing the following, more comprehensive list of comparisons:

	Lee	Berger
1.	School (state) sponsored religious prayer.	School (state) approved distribution of religious literature.
2.	Subject matter (prayers at graduation ceremony) is non-sectarian.	Subject matter (Gideon Bibles) is sectarian (Christian).
3.	School children are 8th graders, 14 years of age.	School children are 5th graders, 10 years of age.
4.	Activity occurs outside regular class time.	Activity occurs during regular class time.
5.	Attendance is voluntary.	Attendance is compulsory.
6.	Teachers do not directly participate in the activity.	Teachers directly participate in the activity (e.g., line up the students to receive Bibles; receive Bibles returned by students).
7.	Purpose of outside speaker is not proselytistic.	Purpose of outside speaker is admittedly proselytistic.[9]
8.	Parents (or custodial adults) are ordinarily present.	Parents (or custodial adults) are not present.

As far as comparing this case to *Lee* on the facts, the Seventh Circuit found that the First Amendment principles announced in *Lee* should be applied here, *a fortiori*:

> The [School] Corporation's practice of assisting Gideons in distributing Bibles for non-pedagogical

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[9] The frontispiece of a Gideon Bible distributed in the Rensselaer schools provided: "The purpose of the [Gideon] Association is the promotion of the Gospel of Christ to all people, to the end that they might come to follow the Lord Jesus Christ as their personal Saviour." *Lisa Suhr Aff.*, Exh. A; *App.*, p. 280.

> purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer.

Id. That conclusion is eminently correct.

2. The Seventh Circuit Decision Is Consistent With *Lemon v. Kurtzman*.

Although the Court of Appeals focused primarily on *Lee*, it also held that the School Corporation's Bible distribution policy violated two of the three prongs of the Establishment Clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 123 (1971), which it acknowledged to be "the law of the land." 982 F.2d at 1171. Specifically, the Seventh Circuit held that the Bible distribution policy has "the effect of sending a message to an objective observer that the [School] Corporation endorses the Gideon's beliefs, and it entangles the government unnecessarily in religious affairs." *Id.*

a. **The School's Distribution of Gideon Bibles Has the Effect of Endorsing Christianity.** With respect to *Lemon*'s second prong, the Court of Appeals concluded that a reasonable observer would likely perceive the School Corporation's annual distribution of Gideon Bibles as an endorsement[10] of Christianity.

In this case, the "reasonable observer" contemplated by the standard is, first and foremost, a representative fifth grade student to whom a Gideon Bible is offered; secondly, it is the "objective observer, acquainted with the text, history and

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[10] Speaking for the Court, Justice Blackmun discussed the meaning of "endorsement" in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94, 109 S.Ct. 3086, 106 L.Ed.2d 472, 494-95 (1989):

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a persons's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687, 79 L.Ed.2d 604, 104 S.Ct. 1355 (O'Conner, J., concurring).

implementation of the [practice]." *Wallace v. Jaffree*, 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, 56 (1985) (O'Conner, J., concurring). Though it appears the "objective observer" should be acquainted with free exercise values, Justice O'Conner recognized that religious intrusions into public schools should be viewed from the perspective of the school children affected:

> At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.

Id., 472 U.S. at 81, 86 L.Ed.2d at 59 (O'Conner, J., concurring). However you look at it, "inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids School District v. Ball*, 473 U.S. at 390, 87 L.Ed.2d at 281.[11]

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[11] *See also Lee v. Weisman*, 505 U.S. ___, 120 L.Ed.2d at 484 ("these are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" (citation omitted)); *Grand Rapids School District v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267, 281-82 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."); *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019, 1028 (1983) ("Here, the individual claiming injury . . . is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure." (citations omitted)); and *Widmar v. Vincent*, 454 U.S. 263, 274 n.14, 102 S.Ct. 269, 70 L.Ed.2d. 440, 450 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."); Tribe, *American Constitutional Law*, 1178 n.53 (2d Ed. 1988).

Turning the second *Lemon* prong toward the practice in Rensselaer of distributing Bibles in the schoolhouse, either the informed objective observer or the fifth grade student observer should consider the following facts:

> First, the Gideon International, an evangelical Christian organization, has been distributing Bibles in the Rensselaer schools for more than 35 years, and that materials of no other religious persuasion have ever been disseminated in the Rensselaer schools. *Dinsmore Dep.*, p. 23, *App.*, p. 449.

Second, distribution of Bibles is made on school premises, during school hours in the presence of school teachers. In recent years, the principal is also present, a flourish which cannot but create the impression that something of official importance is taking place.

Third, distribution of Bibles usually takes place in the classroom, although on some occasions they are handed out in the gymnasium, auditorium or the hallway in front of the principal's office. While the School Corporation has argued that the auditorium or hallway is somehow less likely to be viewed by the children as a sign of endorsement, as the Court of Appeals noted, "the image of hundreds of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement." 982 F.2d at 1166.

Fourth, the children are instructed that if their parents object to the Bibles they receive from the Gideons, the students should return them – to the teacher.

Fifth, the Bible is not part of the fifth grade curriculum and there is no effort to use it pedagogically in any course of study.

Sixth, the proselytizing material set forth in the front and back of the Gideon Bible should be considered, particularly the confession of faith entitled, "My Decision to Receive Christ as my Saviour" under which is a space for the date and signature of the student recipient.

Seventh, it appears that the Gideon Bibles were the only materials distributed to fifth graders that truly expressed

ideas, concepts or a system of values or beliefs.[12] Moreover, no representative of any organization other than the Gideons ever appeared on school premises to personally distribute material of any description, secular or sectarian. Therefore, the only material intended to be studied or assimilated for its intrinsic intellectual value, and the only organization engaged in promoting it, were the Christian Bibles and The Gideon International, respectively.

Finally, the "reasonable observer" should consider the fact that in 1985, in addition to Gideon Bibles, the book "Young People of the Bible" was handed out to fifth grade elementary students, this time by the teacher, not an outsider. *Mindy Suhr Aff.*, ¶3, *App.*, pp. 239-240. This book, the second promoting Christianity received by fifth graders that year, was published by "In Jesus' Love" Foundation, Inc., and underwritten by two local businesses. *Id.*, Exh. A, *App.*, p. 243. It celebrated young people "because a person in his youth most truly reflects the glory of his Creator, in whose image he is made." *Id.*, Exh. A, *App.*, p. 244. The school children were urged to "learn from Jesus Himself, who gathered the little children around Him and told us that 'of such is the kingdom of heaven.' " *Id.* Near the end of the book is a quotation from Daniel Webster, which read in part:

> . . . if the power of the Gospel is not felt throughout the length and breadth of the land, anarchy and misrule, degradation and misery, corruption and darkness, will reign without mitigation or end.

Id., Exh. A., *App.*, p. 273.

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[12] Even if the school granted the same access to the Boy Scouts, Girl Scouts, 4-H and similar groups, it may well be that fifth grade students would view the school as endorsing those organizations. (After all, weren't they, too, "approved" by the superintendent and the principal under the policy?) Indeed, the school may be sending an implicit message of endorsement of these groups when it sends along the permission forms to the students' parents. However, there is no constitutional prohibition against the school endorsing such secular groups as there is against its endorsement of religious groups.

Can these fifth grade schoolchildren, ten years of age, sensitive and impressionable,[13] be expected to conclude anything but that their School endorsed, promoted and favored the Christian religion? Or, for that matter, could a reasonable observer – a person of another generation, older, wiser and more knowledgeable – reasonably reach any different conclusion?

b. **The School's Distribution of Gideon Bibles Entangled It With A Religious Sect.** The conclusion of the Court of Appeals regarding the entanglement prong of the *Lemon* analysis was also correct, for at least the following reasons.

> First, the practice of distributing Bibles had become so much a part of the school calendar that, according to the School Corporation, "no one can remember when the practice commenced." It is not an exaggeration to say that the distribution of Gideon Bibles was about as natural and commonplace in the Rensselaer Middle School as Thanksgiving vacation. It was clearly part of the fall schedule, part of the routine.
>
> Second, the very nature of the in-school distribution scheme necessarily involves school officials. Teachers and administrators do exercise authority over students in the classrooms and auditoriums, and it is only natural that they would queue the children so they might pass by the table and pick up a Bible in an orderly manner.
>
> Third, the relationship between the Gideons and the School administrators had become so close that Mr. Lewis in his capacity as Principal of the Middle School which housed the five fifth grade classes, was a special guest at a banquet held by the Gideons. The invitation, according to Mr. Lewis,

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[13] Lisa Suhr stated that, when as a 10 year old fifth grader she received a Gideon Bible in 1986, two representatives of the Gideon organization, a man and a woman, were introduced by a school official. Although she did not remember the name or title of the school official, she did remember "thinking that the two Gideon representatives were named 'Mr. and Mrs. Gideon.' " *Lisa Suhr Aff.*, ¶4, *App.*, p. 276.

was "basically a thank-you" for allowing Gideon representatives to come into the classrooms. *Lewis Dep.*, pp. 35-36, *App.*, pp. 653-654.

A fourth factor is the administrative arrangement by which students were directed to return Gideon Bibles if and when, after arriving home with them, their parents objected. The school children were instructed to return the Bibles, not to the Gideon representatives who handed them out, but to their fifth grade teacher. *Kooy Dep.*, p. 26. Thus, contrary to the protestations of the School Corporation, school teachers were indeed involved in the distribution procedure. By being involved, even marginally, the School Corporation and the Gideons become identified – that is to say, "entangled" – with one another.

Finally, if one accepts the School Corporation's policy as intended to expose students "to the many facets of their local community" as Petitioner suggests, note must be made of the further requirement of the policy that school officials review the application of every organization that submits materials for distribution. In so doing, of course, the school becomes a censor. It is not surprising then that the Superintendent of Schools would state that, because "we are responsible for protecting the moral being of the kids," *Dinsmore Dep.*, p. 74, *App.*, p. 500, she would decide what would be distributed and what would not. *Id.*, p. 75, *App.*, p. 501 ("It has to be my professional decision."). The Superintendent went on to say that she would approve for distribution materials promulgated by any religious organization except the "satanists" and any other group that is "truly disruptive to the young people of any community." *Id.* at 74, *App.*, p. 500.

Applying its policy in this fashion, the School Corporation was deaf to the early teaching of *Engle v. Vitale*,[14] and blind to the "symbolic link between government and religion" created "in the eyes of impressionable youngsters," *Grand Rapids School District v. Ball*, 473 U.S. at 385, 87 L.Ed.2d at 278, by the undifferentiated interplay between school and church evident in the Bible distribution practice.

Contrary to the decision of the district court, the evidence of entanglement cannot so easily be brushed aside. The Court of Appeals applied the third *Lemon* prong to this evidence and found that the Bible distribution program in the Rensselaer schools constituted excessive entanglement of the government in religious matters. 982 F.2d at 1171. That conclusion, too, is correct.

B. Free Speech Clause

Petitioner submits that "the correct Constitutional question is one of Free Speech and Public Forum jurisprudence and not the Establishment Clause." *Petition*, p. 22. This assertion is based on the proposition that the School Corporation did in fact create a public forum, presumably in the fifth grade classrooms of the Rensselaer Middle School, and that it proved it did so.[15]

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[14] 370 U.S. 421, 431, 82 S.Ct. 1261, 8 L.Ed.2d 601, 608 (1962) (purposes of the Establishment Clause rest "on the belief that a union of government and religion tends to destroy government and to degrade religion," and "upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."); *see also Aguilar v. Felton*, 473 U.S. 402, 409-10, 105 S.Ct. 3232, 87 L.Ed.2d 290, 297-98 (1985).

[15] There is no question but that "public elementary schools are not, as to the general community, traditional public fora." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir. 1988); *see also May v. Evansville Vanderburgh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986). The burden of proving that a school has been turned into a public forum is thus on the party asserting it.

As the record reveals, however, the School Corporation did not prove what was not true.[16] Describing this argument as an "attempt[ed] definitional coup," one that "distorts the facts and misconstrues the law," 982 F.2d at 1165, the Court of Appeals concluded:

> It is dubious whether public schools could or should be used for such purposes, but the salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation.

Id. at 1166. The Court of Appeal's assessment of the evidence is fair and correct, and need not be repeated here.[17]

Worth mentioning, however, is that once before the Seventh Circuit considered the prospect of a public forum in a grade school setting.[18] *May v. Evansville Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986), was an action brought by an elementary school teacher to enjoin a ban on religious meetings held by teachers outside instructional time but on school premises on grounds that the ban violated her free speech rights. After a careful review of the characteristics of public and limited public fora, the court turned to a third kind of forum:

> Finally, there is public property not intended to be a forum for the public expression of ideas and opinions. . . . A non-public forum is not necessarily

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[16] We are reminded of this Court's admonition that forum classification "should be triggered by what a school does, not what it says." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 244, 110 S.Ct. 2356, 110 L.Ed.2d 191, 212 (1990).

[17] It should not go unmentioned that the district court, which never applied nor even mentioned public forum principles of law, did not make a finding that the School Corporation had created a public forum. *See* 766 F.Supp. at 703-707. There never has been a judicial determination to that effect in this case, the negative conclusion of the Court of Appeals being the only one ever entered on this issue.

[18] *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), on which the School Corporation primarily relies, neither of which involve primary schools, were correctly distinguished by the Court of Appeals on that and other grounds. 982 F.2d at 1167-68, 1167 n.6.

> a place of silence; it may still be a forum, as the term implies; it just is not a place generally open to the public. It does not lose its character as a non-public forum merely because outsiders are occasionally invited to speak. A college classroom (and *a fortiori* an elementary school classroom) does not become a public forum because a guest lecturer from the outside is invited to talk to the class.

Id. at 1113.

And so it is here. The primary school classrooms in Rensselaer are, at best, non-public fora. There is no open forum in the Rensselaer schools. The School Corporation did not open its schools, by policy or practice, "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794, 806 (1983); "the public [was] not invited to use its facilities as a soap box," *May v. Evansville Vanderburgh School Corp.*, 787 F.2d at 1113, 1114; and its fifth grade classrooms were never "a limitless potpourri of expressive activity." *Quappe v. Endry*, 772 F.Supp. 1004, 1010 (S.D.Ohio 1991).[19] The fact that the School Corporation occasionally opened its doors to some outside organizations "does not transform [its] property into a public forum." *Perry*, 460 U.S. at 47, 74 L.Ed.2d at 806.

As Judge Posner once said, "There are public forums and there are public forums." *May v. Evansville Vanderburgh School Corp.*, 787 F.2d at 1113. The fifth grade in the Rensselaer Middle School just isn't one of them.

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[19] Acknowledging that the courts have come to recognize the ability of college and high school students to participate in the "market place of ideas" (*Widmar* and *Mergens*, respectively), the district court in *Quappe* deemed it "an exercise in *reductio ad absurdum* to extend this participation to grade-schoolers." *Id.* at 1012.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT AND STATE COURTS.

Petitioner states that "the Constitutionality of the distribution of Bibles in public schools" is a matter that "has been decided in conflicting ways by state and federal courts across the country." *Petition*, p. 13. As authority for this assertion, Petitioner cites a single secondary source, a footnote reference to an annotation, 111 A.L.R.Fed. 135.

A review of that authority, however, reveals three cases in which Bible distribution was approved: *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990), cert. denied 498 U.S. ___, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990), a legitimate public forum case involving the after-hours rental of a high school auditorium by a religious group; *Bacon v. Bradley Bourbonnais High School District*, 707 F.Supp. 1005 (C.D.Ill. 1989), where the Gideon organization distributed Bibles on the sidewalk in front of a public school, a case cited in the trial and appeal courts by the Respondents as properly decided; and, finally, you guessed it, the district court's decision in this, the *Berger* case, before it was reversed in the Court of Appeals. *See* 111 A.L.R.Fed. at 141-42, 147-49. The fact of the matter is that none of these cases lend the slightest support to this Petition for Certiorari.

This is not to say that the courts have not, from time to time, had occasion to pass on the constitutional propriety of distributing Bibles in the public schools during school time. Without exception, however, the courts have found such practices violative of the Establishment Clause.

The first reported case involving the distribution of Gideon Bibles in the public schools is *Tudor v. Board of Education of Borough of Rutherford*, 100 A.2d 857 (N.J. 1953), cert. denied 348 U.S. 816, 75 S.Ct. 25, 99 L.Ed. 644 (1954). Under relatively similar facts, the Supreme Court of New Jersey had no difficulty concluding that the practice violated the First Amendment:

> It matters little whether the teachers themselves will distribute the Bibles or whether that will be done by

> members of the Gideons International. The same vice exists, that of preference of one religion over another. This is all the more obvious when we realize the motive of the Gideons. Its purpose is "to win men and women for the Lord Jesus Christ, through . . . placing the Bible – God's Holy Word . . . or portions thereof in hotels, hospitals, schools, institutions, and also through distribution of same for personal use." The society is engaged in missionary work, accomplished in part by placing the King James version of the Bible in the hands of public school children throughout the United States. To achieve this end it employs the public school system as the medium of distribution.

Id. at 868. The avowed purpose of the Gideons in New Jersey in 1953, incidentally, is virtually the same as the Gideons in Rensselaer today. *See Lisa Suhr Aff.*, Exh. A., *App.*, pp. 278-281; *Dinsmore Dep.*, Exh. E, *App.*, pp. 539-544.

The next case involving Gideon Bible distribution was *Brown v. Orange County Board of Public Instruction*, 128 So.2d 181 (Fla.App. 1960). Recounting the history of the Gideon organization and articulating the doctrine of separation of church and state, the court concluded:

> The distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts. This distribution likewise would tend to impair the rights of plaintiffs and their children to be free from governmental action which discriminated in the free exercise of religious belief.

Id. at 185 (citations omitted). The court reversed a trial court ruling dismissing the complaint of the parents of affected public school children. *Id.* at 186.

A similar result was reached in *Goodwin v. Cross County School District No. 7*, 394 F.Supp. 417 (E.D.Ark. 1973). Again noting the avowed missionary purpose of the Gideon organization, the court struck down "the practice . . . approved by the School Board and permitted by the school

authorities of distributing the Gideon Bible by a representative of the Society to the fifth grade students" as violative of the First Amendment. *Id.* at 428.

Later on in the seventies, a Florida school board adopted guidelines governing the dissemination of religious books and doctrine of all denominations. While designed to religious minorities as applied only the Gideon organization took advantage of the arrangement. Indeed they did, for nearly 33,000 Bibles were handed out in cafeterias and other common areas of the schools before suit was brought. The Fifth Circuit then declared the practice an unconstitutional entanglement of church and state in *Meltzer v. Board of Public Education of Orange County, Florida*, 548 F.2d 559, 574-76 (5th Cir. 1977). Although this decision was subsequently vacated by an equally divided *en banc* panel of the Fifth Circuit, 577 F.2d 311, 312 (5th Cir. 1978) (*en banc*) (*per curiam*), on grounds of mootness and non-justiciability because Bible distribution in the future under similar circumstances was unlikely, a five-judge minority reached the merits, saying in dissent:

> [I]ndoctrination is more likely where students are younger, less experienced, less skeptical, and more impressionable. The distribution efforts involved here are aimed at just such students – those in elementary and secondary schools. These young children cannot help but be influenced by the school's approval of the presence of Gideon Bibles as being in itself an approval of Gideon doctrine, lest why else would the books be allowed. Second, the aid in the present case is clearly of an ideological nature – the distribution of the Bible, an instrument of religion which cannot be gainsaid. Finally, the [Supreme] Court . . . warned against permitting aid of a continuing nature. In the present case the Gideons have made repeated visits to the schools and have even made a request, though tabled by the Board, to allow even further distribution efforts.

Id. at 319 (dissenting opinion). *See also Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985)

(distribution of Bibles deemed moot where Gideons stated they would no longer distribute at Little Axe or any other school in Oklahoma, and school had no plans to distribute Bibles from any other source).

Simply stated, there is no conflict in pertinent decisions among the federal circuits, nor is there any authority involving the distribution of Bibles in public schools contrary to the decision rendered by the Seventh Circuit in this case. As such, there is no conflict for this Court to resolve, and no compelling reason of this sort that the Petition for Certiorari be granted.

CONCLUSION

The decision below is not in conflict with the decisions of this Court or those of any Court of Appeals. The Seventh Circuit Court of Appeals properly held that the policy and practice of distributing Bibles on school premises during school time by the Rensselaer Central School Corporation constitutes a violation of the Establishment Clause of the First Amendment to the United States Constitution. Accordingly, on the basis of the record in this case and the arguments and authorities set forth in this Response, Respondents respectfully request entry of an order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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